

Recent Developments in the Cancellation, Renewal and Rescission of Automobile Insurance Policies

James D. Ghiardi

Robert O. Wienke

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

James D. Ghiardi and Robert O. Wienke, *Recent Developments in the Cancellation, Renewal and Rescission of Automobile Insurance Policies*, 51 Marq. L. Rev. 219 (1968).

Available at: <http://scholarship.law.marquette.edu/mulr/vol51/iss3/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

MARQUETTE LAW REVIEW

Vol. 51

WINTER, 1967-68

No. 3

RECENT DEVELOPMENTS IN THE CANCELLATION, RENEWAL AND RESCISSION OF AUTOMOBILE INSURANCE POLICIES

JAMES D. GHIARDI* AND ROBERT O. WIENKE**

CONTENTS

I. INTRODUCTION	220
II. RECENT STATUTORY LIMITATIONS UPON THE RIGHT OF CANCELLATION OR NONRENEWAL	220
A. REQUIREMENTS OF ADVANCE NOTICE	221
B. REQUIREMENTS AS TO THE CONTENT OF THE NOTICE	223
C. LIMITATION UPON REASONS FOR CANCELLATION OR REFUSAL TO RENEW	225
D. THE SCOPE OF THE CANCELLATION— NONRENEWAL STATUTES AND PROPOSALS.....	228
III. RECENT VOLUNTARY LIMITATIONS UPON THE RIGHT OF CANCELLATION OR NONRENEWAL.....	231
IV. POLICY CANCELLATION PROCEDURE	233
V. EXPIRATION AND RENEWAL	237
VI. AUTHORITY OF AGENTS TO CANCEL OR TO RECEIVE NOTICE THEREOF	238
VII. NOTICE TO LOSS PAYEE	237
VIII. THE RIGHT OF RESCISSION FOR MISREPRESENTATION	239
IX. LIMITATIONS UPON THE RIGHT OF RESCISSION	243
A. COMPULSORY AUTO INSURANCE AND FINANCIAL RESPONSIBILITY LAWS	243
B. ASSIGNED RISK PLANS	247
C. WAIVER, ESTOPPEL AND ELECTION	248
X. CONCLUSION	249
XI. APPENDIX	251

*Professor of Law, Marquette University; Research Director, Defense Research Institute; Member, State Bar of Wisconsin.

**Assistant Research Director, Defense Research Institute; Member, State Bar of Wisconsin.

I. INTRODUCTION

There has been increasing public concern over the right of insurers to arbitrarily cancel existing automobile insurance policies and the refusal to renew expired policies. The insurance industry has met this criticism by voluntarily limiting their rights to cancel or refuse to renew, and by proposing and supporting state legislation to regulate cancellation and non-renewal. This public concern has been voiced in the chambers of the United States Congress, and there is a present danger that the Federal government may encroach upon the traditional and time honored system of the state regulation of the insurance industry.¹

Some of the public criticism may be justified with regard to the few insurance companies who have arbitrarily canceled or refused to renew the policies of their policyholders.² However, recent studies have shown that the large majority of the companies within the insurance industry do not follow such practices and that the number of cancellations and refusals to renew is insignificant in relation to the total number of policies outstanding.³

This article will discuss the more recently enacted and proposed state legislation aimed at the problems of cancellation and non-renewal. These legislative proposals would not only drastically modify the insurer's right to cancel or refuse to renew, but could also prevent the insurer from invoking its traditional common law right to rescind the policy for misrepresentation. This article will also discuss many of the more recent cases dealing with cancellation, non-renewal, and rescission of the automobile insurance policy.⁴

II. RECENT STATUTORY LIMITATIONS UPON THE RIGHT OF CANCELLATION OR NON-RENEWAL

At least twenty-four states have enacted laws regulating the cancellation or non-renewal of automobile insurance policies;⁵ thirteen of

¹ A recent Congressional report stated that Members of Congress have received complaints of "oftentimes arbitrary and capricious cancellation or refusal to renew automobile insurance policies. . . ." HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, AUTHORIZING A STUDY OF THE MOTOR VEHICLE ACCIDENT COMPENSATION SYSTEM, H.R. REP. No. 1282, 90th Cong., 2d Sess. (The resolution passed and was signed by President Johnson on May 22, 1968).

² Paul Wise, general manager of AMERICAN MUTUAL INSURANCE ASSOCIATION, states in the April 19, 1968 issue of *The National Underwriter*, "There is a growing evidence that public complaints about unfair or arbitrary cancellation are being triggered by the activities of companies representing a relatively small share of the total business."

³ *Id.* A 1966 Wisconsin survey showed that the state's auto insurers as a group canceled only .57% of the policies in force during the midterm and declined to renew only 2.06%.

⁴ For a short outline of this article, see, Ghiardi, *Cancellation, Expiration and Rescission of Automobile Insurance Policies*, P.L.I.—AUTOMOBILE INSURANCE PROBLEMS, Ch. 5, 117-143 (1968).

⁵ See Appendix.

these states have enacted new or revised statutes within the last year.⁶ These statutes may prescribe:

- (a) requirements as to advance notice to the insured of a cancellation or refusal to renew;
- (b) requirements as to the content of the notice;
- (c) limitations upon the reason for cancellation or non-renewal;
- (d) limitations upon the method of cancellation or non-renewal.

The major trade associations of the insurance industry have taken a leading role in the reform of state laws regulating the cancellation and non-renewal of automobile insurance policies. The American Insurance Association, the American Mutual Insurance Association, and the National Association of Independent Insurers, have been working closely in the development and support of model cancellation legislation. Early in 1967, the three associations developed four "model bills" which had many common characteristics but which varied in their content in order to meet the demands of a particular jurisdiction. Some states have already enacted statutes substantially similar to these proposals.

The most recent proposal, which has received the approval of AIA and AMIA, would limit cancellation by insurers to only two reasons—nonpayment of premium and the loss of driving privileges. NAII has not fully accepted this most recent proposal because they believe that the two reason-approach may create other practical problems.⁷ Throughout this article the various trade association proposals will be referred to collectively as the "model bill." Generally, the term "model bill" refers to the most extensive proposal advanced, which was that proposed by AIA in November of 1967.

The effect of these statutes on existing law can only be surmised until case law develops. Limitations upon the method of cancellations will not be discussed because only a few of the statutes modify the method of cancellation as prescribed in the standard automobile insurance policy. Thus a few statutes require that the notice be sent by registered or certified mail,⁸ instead of regular mail which is sufficient under the standard policy.⁹

A. Requirements of Advance Notice

Nineteen states have statutory provisions that require the insurer to mail to the insured advance notice of the effective date of cancella-

⁶ *Ibid.*

⁷ Letter from Steven S. Skarlet, Ass't Counsel NAII, to the authors, March 5, 1968.

⁸ MASS. GEN. LAWS. ANN. ch. 175, § 113, A (2) (Supp. 1966) (registered mail); Mich. Stat. Ann. § 24.1302 (Supp. 1968) (certified mail).

⁹ See Section IV.

tion,¹⁰ and seventeen require advance notice of non-renewal.¹¹ These statutes require that the effective date of cancellation or non-renewal be at least ten to forty-five days from the date of the mailing of the notice.¹² These statutes may apply to all automobile insurance policies, or only to policies issued under the state's financial responsibility law. If the statute only applies to policies issued under the financial responsibility laws, problems involving construction of the statute may arise.

This problem arose in the case of *Erie Ins. Exch. v. Gosnell*.¹³ The Maryland statute required that thirty days advance notice of cancellation be given to the applicable state agency regulating the financial responsibility law and was silent as to whether such notice was required to be given the insured in order to effectively cancel the policy.¹⁴ The insurer mailed advance notice of cancellation to the state agency which was to be effective thirty days from the mailing, and mailed a similar notice to the insured, which was to be effective twenty days from the mailing. The accident in question occurred subsequent to the twenty day period but prior to the thirty day period. The insured conceded that it was obligated to pay for the damages of innocent third parties injured in the accident since the period for cancellation under the financial

¹⁰ See *Appendix*. The case of *Barrera v. State Farm Mut. Auto. Ins. Co.*, 1968 CCH Auto. Ins. Cases 7787 (Cal. App. 1968) construed this type of statute as also eliminating the right of rescission for a material misrepresentation. This case is further discussed at note 158 *infra*.

¹¹ *Ibid*.

¹² CAL. INS. CODE § 651 (Supp. 1967) (ten days—cancellation); W. VA. CODE § 33-6A-4 (Supp. 1967) (forty-five days—nonrenewal).

¹³ 246 Md. 724, 230 A2d 467 (1967).

¹⁴ The following statutes only require advance notice to the applicable state agency and a problem similar to the *Erie* case could arise. ALA. CODE tit. 36, § 74(63) (Supp. 1965); ALAS. STAT. § 28.20.450 (1959); ARIZ. REV. STAT. ANN. § 28-1171 (Supp. 1967); ARK. REV. STAT. ANN. § 75-1467 (Supp. 1967); CAL. INS. CODE § 16433 (Supp. 1967); COLO. REV. STAT. ANN. § 13-7-39 (1967); CONN. GEN. STAT. REV. § 14-112(b) (Supp. 1967); DEL. CODE ANN. tit. 21, § 2908 (Supp. 1967); D.C. CODE § 40-474 (Supp. 1966); HAWAII REV. LAWS § 160-111 (Supp. 1965); FLA. STAT. ANN. § 324.181 (Supp. 1967); IDAHO CODE ANN. § 49-1522 (Supp. 1967); IND. ANN. STAT. § 47-1064 (1967); ILL. REV. STAT. ch. 95½, § 7-318 (Supp. 1967); KAN. GEN. STAT. ANN. § 8-726 (b) (Supp. 1967); KY. REV. STAT. § 187.500 (Supp. 1967); LA. REV. STAT. § 32:901 (Supp. 1966); ME. REV. STAT. ANN. ch. 29, § 787 (Supp. 1967); MD. ANN. CODE ART. 66½, § 142 (1967); MASS. GEN. LAWS ANN. ch. 175, § 113A (Supp. 1966); MICH. COM. LAWS ANN. § 257.521 (Supp. 1967); MINN. STAT. § 170.41 (Supp. 1967); MISS. CODE ANN. § 8285.22 (Supp. 1966); MO. REV. STAT. § 303.210 (Supp. 1967); MONT. REV. CODES ANN. § 530439 (Supp. 1967); NEB. REV. STAT. § 60-544 (Supp. 1967); NEV. REV. STAT. § 485.3092 (1967); N.J. REV. STAT. § 39:6-40 (Supp. 1967); N.M. STAT. ANN. § 64-24-88 (Supp. 1967); N.Y. VEHICLE & TRAFFIC LAW § 313 (Supp. 1967); N.C. GEN. STAT. § 20-309 (Supp. 1969); N.D. CENT. CODE § 39-16-21 (Supp. 1967); OHIO REV. CODE ANN. § 4509.57 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 7-325 (Supp. 1967); ORE. REV. STAT. § 486-506 (1967); PA. STAT. ANN. tit. 75, § 1422 (1967); R.I. GEN. LAWS ANN. § 31-32-25 (Supp. 1967); S.C. CODE § 46-702 (Supp. 1967); S.D. CODE § 44.03A52 (1960); TENN. CODE ANN. § 59-1224 (Supp. 1967); TEX. REV. CIV. STAT. ART. 6701h, § 22 (Supp. 1967); UTAH CODE ANN. § 41-12-22 (Supp. 1967); VT. STAT. ANN. tit. 23, § 804 (Supp. 1967); Ch. 623 [1966] VA. Session Laws 957; WASH. REV. CODE ANN. § 46.29.500 (Supp. 1967); W. VA. § 17D-4-13 (Supp. 1967); WIS. STAT. ANN. § 344.34 (Supp. 1967); WYO. STAT. ANN. § 31-312 (Supp. 1967).

responsibility law had not expired. The insurer paid these claims and subsequently brought suit against its insured for reimbursement under the financial responsibility clause of its policy.¹⁵ The insurer argued that the twenty day notice of cancellation was valid as to its insured, who should thus be required to reimburse the insurer for the claims paid. The court rejected the insurer's contention and stated: "... the requirement of the Act, as we interpret it, makes the 30 day notice a requisite for an effective cancellation as between the parties to the policy as well as to the public. . . ."¹⁶

Problems may also arise as to the construction of statutes which require advance notice of non-renewal. One such problem is whether a notice of non-renewal is required when the insured rejects an offer of renewal or remains silent. Another problem is whether a notice of non-renewal may be effective if it is found in the regular renewal premium notice which includes an admonition to the insured that if the premium is not forth-coming within a certain period of time the policy will expire on a certain date. The case law is not entirely clear on these questions, and most of the cases have been limited to the state of New York. These problems are discussed in a fairly current article in *The Insurance Counsel Journal* by Walter Relihan.¹⁷

B. Requirements as to the Content of the Notice

Several of the more recently enacted or proposed state statutes require that the insurer include certain information for the benefit of the insured in its notice of cancellation or non-renewal. Some statutes require that the insurer include specific reasons for its cancellation or non-renewal, or that the notice of cancellation or non-renewal include a statement to the effect that upon written request of the named insured, the insurer will specify the reasons for such cancellation or non-renewal.¹⁸ Some statutes require the insurer in its notice of cancellation or non-renewal to inform the insured of his possible eligibility for insurance through the assigned risk plan of the state;¹⁹ or, if the state has a compulsory auto insurance law, to inform the insured of his obligation under such law.²⁰

It seems that the purpose of requiring the insurer to include in a notice of cancellation or non-renewal the reasons thereof, is to serve as a check upon arbitrary cancellation and to insure that the policyholder fully understands the reason for cancellation or non-renewal. This pro-

¹⁵ See note 145 *infra*.

¹⁶ See note 13 *supra* 230 A.2d at 472.

¹⁷ Relihan, *The Uncertain Expiration Date of the Auto Liability Policy: Some Problems Under Financial Security and Compulsory Insurance Law*, 29 INS. COUNSEL J. 639 (1962).

¹⁸ WIS. STAT. 204.341 (8) (1967) (cancellation and nonrenewal); N.Y. Assembly Bill No. 5403 (Feb. 1968) (cancellation and nonrenewal).

¹⁹ WIS. STAT. 204.341 (7) (1967).

²⁰ N.Y. VEHICLE & TRAFFIC LAW § 313 (Supp. 1967).

vision would also allow the insured to correct a cancellation or non-renewal which is based upon mistaken information. The "model bill" would only require that the reasons be furnished in a notice of cancellation, and not in a notice of non-renewal. However, a Wisconsin statute,²¹ and a bill before the New York legislature which is supported by the New York Insurance Department, would also require that the reasons be included in a notice of non-renewal.²² The New York bill would require that the reasons be included in the notice, whereas the "model bill" provides in the alternative that the insurer may include a statement that the reasons will be furnished upon the request of the insured.

Assuming that the reason given for the cancellation or non-renewal is proven to be "incorrect," the question arises as to whether the cancellation is effective notwithstanding the defective reason, and whether the insurer may be liable for defamation for supplying an incorrect reason in its notice though the statutes generally protect the insurer from liability for defamation. The "model bill" provides immunity from defamation for the insurer and other persons who furnish information as to the reasons for cancellation.²³ The New York bill²⁴ would provide for immunity only if the statement of the reason was in "good faith."

Although the insurer may not be liable for defamation in supplying an incorrect reason for cancellation, the question may arise as to whether the cancellation for an incorrect reason is effective to terminate the policy. The case of *Sawyer v. State Farm Fire & Gas Co.*²⁵ held that cancellation is ineffective if it is for an "incorrect" reason. The insurer's policy stated that it was issued "in consideration of the premium paid." The court held that the statement in the policy constituted an acknowledgement of the receipt of the premium, and that under a California statute this constituted conclusive evidence of the payment of the premium. Despite the fact that the total premium had not been paid, the insurer could not cancel the policy for nonpayment of premium. "Where a notice of cancellation specifies as the sole reason for the cancellation of an automobile insurance policy grounds not legally available to the insurer, the notice is not effective."²⁶

Assuming that the reason provided is correct, how specific must the insurer's statement of the reason be? A recent case arose under the Massachusetts statute which requires the insurer to give "specific reason or reasons for such cancellation."²⁷ *Fields v. Parsons*²⁸ held that the insurer's notice of cancellation which gave as the reason for cancella-

²¹ WIS. STAT. § 204.341 (8) (1967).

²² *Ibid.*

²³ AIA, Cancellation-Nonrenewal Bill (Nov. 30, 1967) Section 8.

²⁴ See note 18 *supra*.

²⁵ 62 Cal. Rptr. 709 (Cal. App. 1967).

²⁶ *Id.* at 713.

²⁷ MASS. GEN. LAWS ANN. Ch. 175, § 113 A (2) (Supp. 1966).

²⁸ 1968 CCH Auto. Ins. Cases 7524 (Mass. App. 1968).

tion—"Misstatements in application to Question 8A"—was not specific enough to effectuate cancellation under the Massachusetts statute.

It does not inform the insurer of the substance of question 8A, of the nature of the "misstatements" discovered, or, indeed, whether the questions was included in the application for registration or for insurance. Had an adequate notice been given to (the insured), he may have found grounds to prevent the cancellation, or have been able to obtain a new policy of insurance elsewhere. Compliance with the notice requirement is important to the effective administration of the compulsory motor vehicle insurance law since the legislative purpose was to make the validity of the registration coterminous with the maintenance of the minimum security. . . . Compliance also serves as a safeguard against unintentional or mistaken action to the detriment of the traveling public and to the insured. . . .²⁹

This seems to place too great a burden upon the insurer, and it is hoped that other jurisdictions would either not follow this case or distinguish it. It should be emphasized that the case arose under the compulsory automobile insurance law of Massachusetts. It should also be pointed out that the Massachusetts' statute requires the "specific" reason or reasons for cancellation, whereas other statutes as the "model bill" do not use the word "specific."³⁰ Although there have been no recent cases as to the effect of a notice of cancellation which fails to contain information informing an insured of his possible eligibility under the assigned risk plan of the state, it has been held in the New York case of *Mong v. Allstate Ins. Co.*³¹ that a notice of cancellation which fails to include a warning to the insured of his obligations under the compulsory auto insurance law is ineffective to cancel the policy.

C. Limitation Upon Reasons for Cancellation or Refusal to Renew

Most of the recent statutes have restricted the reasons for which an insured can cancel. Seventeen state statutes provide that the insurer can cancel only on certain legislatively approved grounds.³² This is illustrated by the recently enacted Illinois statute³³ which provides that after the insurer has a sixty day underwriting period in which to investigate the risk, the company can cancel for certain specified reasons. These reasons include: nonpayment of premium; material misrepresentations; violations of the terms or conditions of the policy; failure to disclose accidents or violations; failure to disclose necessary information to the insurer; aiding fraudulent claims; convictions of certain traffic violations; an accident record, conviction record (criminal or traffic), physi-

²⁹ *Id.* at 7525.

³⁰ AIA, Cancellation-Nonrenewal Bill (Nov. 30, 1967) Section 3.

³¹ 15 A.D.2d 257, 223 N.Y.S.2d 218 (1962).

³² See Appendix.

³³ ILL. STAT. ANN. 73-755.3 (Supp. 1967).

cal, mental or other condition which is such that his operation of an automobile may endanger public safety; or certain changes in the condition or use of the insured vehicle. The Illinois statute provides for a hearing with the Director or Insurance, in which the insured may contest the reasons for cancellation.³⁴ The Illinois statute is very similar to the "model bills" which have been endorsed by AIA, AMIA and NAIL.

Wisconsin has recently enacted a statute which prohibits the insurer from basing his cancellation or refusal to renew upon certain prohibited grounds.³⁵ The Wisconsin statute is unique in that it is "prohibitive," rather than "prescriptive." In Illinois the insurer can cancel for only certain legislatively sanctioned reasons, whereas in Wisconsin the insurer can cancel for any reason whatsoever as long as he does not base his cancellation solely upon certain legislatively prohibited grounds. Thus the Wisconsin provision is to some extent less restrictive than any of the "model bills." However, the Wisconsin statute is more restrictive in its scope, because it applies not only to cancellation but also to non-renewal. None of the "model bills" attempt to restrict the insurer's right to refuse to renew. Many of the prohibited grounds in the Wisconsin statute do not really restrict the action of the insurer, in that they merely prevent religious or racial discrimination or similar activities.³⁶ However, several parts of the statute are significant in that they prohibit cancellation or refusal to renew solely on the basis of age, residence, or occupation.

AMIA and AIA have indicated that they will sponsor and actively promote legislation to limit cancellation (not refusal to renew) to only the nonpayment of premium, and the revocation or suspension of license or registration, after the sixty day underwriting period. The AIA proposal would apply not only to the liability coverage, but also to medical payments, uninsured motorist, automobile physical damage and automobile collision coverage. The AMIA-AIA proposal would not provide an appeal to the insurance commissioner, as the Illinois statute does, since its sponsors feel that with grounds for cancellation so limited the probability of appeals is quite remote.³⁷ This most recent AIA-AMIA "model bill" has already been enacted in South Dakota.³⁸

Although the most recent AIA-AMIA "model bill" purports only to restrict the insurer's right of "cancellation," serious questions exist

³⁴ ILL. STAT. ANN. 73-755.10 (Supp. 1967).

³⁵ WIS. STAT. 204.341 (4) (1967) provides: No insurer shall cancel or refuse to renew an automobile liability insurance policy solely because of the age, residence, race, color, creed, national origin, ancestry or occupation of anyone who is an insured.

³⁶ Other state statutes merely prohibiting discrimination in the sale or cancellation of insurance policies are; CAL. INS. CODE § 11628 (Supp. 1967), and N.Y. INS. LAW § 40(10) (Supp. 1967).

³⁷ Letter from Rafael Alexander, of AIA, to the authors Dec. 20, 1967.

³⁸ S. D., H-684, Laws 1968.

as to whether the bill would eliminate the insurer's common law right of rescission. This is reinforced by the fact that the previous "model bills" had recognized misrepresentation as one of the sanctioned reasons for cancellation. Limitations upon the insurer's right of rescission have been recognized in both the case law and statutory law, as will be discussed *infra*, and such limitation would appear to be justified *after* the occurrence of loss. For example, when innocent third parties are involved, the policy may be held enforceable despite the fraud of the insured in order to protect the interests of the innocent third parties. However, there seems to be little justification for preventing the insurer from canceling the insurance for misrepresentation *prior* to the occurrence of loss. For example, is there any good reason why an insurer should be prevented from canceling an insurance policy when, subsequent to the initial sixty day underwriting period, it discovers that the insured has perpetrated a fraud upon it?

Aside from the Wisconsin statute, none of the statutes or proposals would restrict the reason for which an insurer could refuse to renew an insurance policy. Although critics of the insurance industry could argue that the recent "model bills" are mere "tokenism" since they merely limit cancellation and insurers could still arbitrarily refuse to renew policies. This argument does not recognize the other solutions available for the problems of non-renewal. For example, assuming that the refusal to renew was arbitrary, the insured would stand a good chance of obtaining insurance with another company, because there has been increasing activity in the industry to ignore prior cancellation as a determinative factor in underwriting. If the refusal to renew was justified, the critics of the industry fail to recognize the availability of assigned risk plans which exist in every state in the United States.³⁹

Because the most recent AMIA-AIA proposal has been enacted in only one state (and this enactment was quite recent),⁴⁰ there have been no cases interpreting it and one can only speculate as to the prospective judicial interpretation. However, recent cases point out a trend toward finding an improper cancellation, and these cases may be helpful in predicting the future development of the law.

The Supreme Court of North Carolina recently had the opportunity to define "nonpayment of premium" under its assigned risk laws. *Harrelson v. State Farm Mut. Auto Inc. Co.* held the insured's failure to pay the insurer a filing fee under the financial responsibility law did not constitute a nonpayment of premium within the meaning of the assigned risk statute authorizing cancellation for the nonpayment of premium.

³⁹ See notes 156 and 157 *infra*.

⁴⁰ See note 38 *supra*.

⁴¹ 158 S.E.2d 812 (N.C. 1968).

The court stated:

So as to accomplish the purpose of the Legislature we hold that this charge, while lawfully and rightfully due the defendant (insurer), was not a premium on the policy but was a charge for the issuance by the defendant of a separate and distinct document whereby it incurred a different obligation. . . .⁴²

Thus, the fact that the insured owes the insurer a debt does not necessarily mean that the failure to discharge this obligation constitutes a failure to pay the premium.

A Tennessee appellate court, in the case of *State Farm Mut. Auto. Inc. Co. v. Darnell*⁴³ held that a cancellation for nonpayment of premiums was not effective when the agent of the insurer had sufficient funds of insured in his possession to pay the premium.

D. *The Scope of the Cancellation-Nonrenewal Statutes and Proposals*

Originally, the so-called "model bills" applied only to automobile liability insurance, medical payments, and uninsured motorist coverage. Later the three trade associations agreed to also include physical damage insurance.⁴⁴ Generally the statutes or proposals do not apply to:

- (a) assigned risk policies
- (b) fleet policies
- (c) garage-owned automobiles⁴⁵

The reason behind the last two exclusions seems to be a judgment that the purchasers of such policies are sufficiently knowledgeable about insurance coverage, with a sufficient coverage, with a sufficient bargaining position and hence are not in need of the statutory protection. Assigned risk policies are excluded probably because of a belief that the insureds under the assigned risk plan are already sufficiently protected from arbitrary cancellation under the terms of the plan. Whether or not this assumption is valid depends upon the terms and conditions of the assigned risk plan in the jurisdiction in which the cancellation-nonrenewal legislation is enacted. Because of this exclusion, the situation could arise wherein the insurer would be restricted in its cancellation or nonrenewal of its regular policies under the statute, yet because of the statutory exclusion be unrestricted in its cancellation or nonrenewal of assigned risks policies.

⁴² *Id.* at 819.

⁴³ 1968 CCH Auto. Ins. Cases 7600 (Tenn. App. 1968).

⁴⁴ See note 7 *supra*.

⁴⁵ AIA-Cancellation-Nonrenewal Bill (Nov. 30, 1967) in Section 1 (A) provides: this Act shall not apply (1) to any policy issued under an automobile assigned risk plan, or (2) to any policy insuring more than four automobiles, or (3) to any policy covering garage, automobile sales agency, repair shop, service station or public parking place operation hazards.

A study of the Wisconsin Automobile Assigned Risk Plan⁴⁶ shows that the plan provides for many of the problems which the cancellation-nonrenewal "model bills" attempt to deal with. The applicant for the assigned risk plan must certify that he attempted and was unable to obtain insurance in the state within sixty days prior to his application. The application must be made in "good faith," which means that the applicant "reports all information of a material nature, and does not wilfully make incorrect or misleading statements."⁴⁷ The major eligibility requirement for admission and continuance in the plan is that the applicant has not been convicted within the previous thirty-six months of two major or six minor traffic violations.⁴⁸ The applicant may also be ineligible if he is subject to certain physical or mental disabilities.⁴⁹

Under the plan all eligible applicants are provided coverage for the period of four years. The insurer is required to issue three renewal policies; 45 days prior to the expiration date of the annual term of the policy, the insurer is required to notify the insured that it will issue a renewal and of the premium payable, or that the insured is not entitled to insurance under the plan. Forty-five days prior to the expiration date of the third renewal policy, the insurer must notify the insured that the assignment under the plan will terminate upon the expiration date of the policy.⁵⁰ At the end of the four year period, if the insured is still unable to obtain regular insurance, he must make a new application for the plan.⁵¹ The insurer is given the right to cancel the coverage pursuant to notice provisions of the policy issued.⁵² The plan requires that the policy be issued in accordance with the terms of the Standard Provisions Basic Automobile Liability Policy (1955 Edition),⁵³ which requires 10 days advance notice of cancellation by the insurer.⁵⁴ The insurer is also required to give 10 days advance notice to the Commissioner of Insurance of all cancellations, other than those for the non-payment of premium.⁵⁵

Under the Wisconsin Assigned Risk Plan the insurer is limited as to the reason for which it may cancel the policy.⁵⁶ One of the authorized

⁴⁶ Wisconsin Automobile Assigned Risk Plan, distributed by Nat. Bur. of Cas. Underwriters, N.Y. (adopted pursuant to Wis. STAT. § 204.51 (2) (1967)).

⁴⁷ *Id.* § 9.

⁴⁸ *Id.* § 9 (A) through (F).

⁴⁹ *Id.* § 9 (G).

⁵⁰ *Id.* § 14 (B) and (C).

⁵¹ *Id.* § 13.

⁵² *Id.* § 18.

⁵³ *Id.* § 16 A.

⁵⁴ The cancellation clause of the Standard Provisions Basic Automobile Policy (1955 Ed.) is substantially similar to the provisions of the Standard Family Combination Automobile Policy (1963 Rev.) which may be found in Section IV *infra*.

⁵⁵ Wisconsin Automobile Assigned Risk Plan, note 46 *supra* § 18.

⁵⁶ *Id.* § 18 (B) states: A carrier which has issued a policy or binder under this Plan shall have

reasons is that the insured "has obtained the insurance through fraud or misrepresentation." The insurer or an applicant may appeal any cancellation or denial of insurance to the Governing Committee of the Plan, and hence to the Commissioner of Insurance.⁵⁷ Although an insurer under the Assigned Risk Plan may use misrepresentation as a reason for cancellation, a question could arise as to whether he can rescind the policy *ab initio* for a material misrepresentation. However, the Wisconsin Assigned Risk Plan is clear and states: "Nothing herein shall be deemed to affect the carrier's right to rescind a policy for fraud or misrepresentation or to invoke other remedies provided by law."⁵⁸

The requirement of advance notice of cancellation and nonrenewal of the Wisconsin Assigned Risk Plan is quite similar to the provisions of the more recently enacted or proposed legislation found in the "model bills," although the Wisconsin Assigned Risk Plan's ten day advance notice of cancellation is perhaps a shorter period of time than that found in the recent proposals or statutes. The "model bill" requires that the insurer include in the notice of cancellation a statement of the reason for cancellation or a statement that the reasons may be obtained upon request, whereas the Assigned Risk Plan does not have this requirement.

Under the Wisconsin Assigned Risk Plan, the insurer may cancel or rescind a policy for misrepresentation whereas under the AIA-AMIA "model bill," the insurer would not be able to cancel the policy for misrepresentation, and could probably be denied the right of rescission. Thus, the enactment of a statute similar to the most recent AIA-AMIA proposal may create a paradoxical situation in that the insurer could not rescind or cancel most of their regular automobile insurance policies on account of misrepresentation, but could rescind or cancel assigned risk policies for misrepresentation.

Under the Wisconsin Assigned Risk Plan the insurer may cancel an insured's policy if the insured accumulates a record of traffic violations which would make him ineligible under the plan. However, under the most recent AIA-AMIA proposal, except for non-payment of premium, the insurer can only cancel the policy when the insured or certain other persons have their driver's license or motor vehicle registration

the right to cancel the insurance by giving notice as required in the policy or binder if the insured

1. is not or ceases to be eligible or in good faith entitled to insurance, or
2. has failed to comply with reasonable safety requirement, or
3. has violated any of the terms or conditions upon the basis of which the insurance was issued, or
4. has obtained the insurance through fraud or misrepresentation, or
5. has failed to pay any premiums due under the policy. . . .

⁵⁷ *Id.* § 19.

⁵⁸ *Id.* § 18.

revoked.⁵⁹ These "other persons" include any person who either resides in the same household of the insured, or who customarily operates the insured's automobile. Thus, the AIA-AMIA proposal would rely to an even greater extent upon the licensing and registration requirements of the jurisdiction in question than does the Wisconsin Assigned Risk Plan. If the right of cancellation is to be controlled by the state statutes regulating licensing and registration, the insurance industry has even more reason to support the adoption of stricter licensing and registration requirements.

III. RECENT VOLUNTARY LIMITATIONS UPON THE RIGHT OF CANCELLATION OR NONRENEWAL

Many insurance companies have agreed to voluntarily limit their right of cancellation or nonrenewal. These proposals may be either in the form of company directives or by endorsement in the insurance policy. Some insurance organizations have recently supported legislative action instead of such voluntary action because of the failure of a few companies to adopt the voluntary proposals.⁶⁰

The earliest of these proposals was the voluntary restriction upon the reasons for which an insurer could base its cancellation. The number of these reasons varied anywhere from seven to the more recent proposal of two; namely, the nonpayment of premium and the loss of driving privileges.⁶¹ The voluntary restriction is not effective until after a sixty day underwriting period, during which the insurer may investigate the risk and the statements in the application. An example of this type of limitation is the "Pledge Against Cancellation" endorsement of Allstate Insurance Co.⁶² Allstate's "Pledge Against Cancellation" does

⁵⁹ AIA, Cancellation-Nonrenewal Bill (Nov. 30, 1967) Section 2 (A) provides:

(A) A notice of cancellation of a policy shall be effective only if it is based on one or more of the following reasons:

(a) nonpayment of premium; or
(b) the driver's license or motor vehicle registration of the named insured or of any other operator who either resides in the same household or customarily operates an automobile insured under the policy has been under suspension or revocation during the policy period or, if the policy is a renewal, during its policy period or the 180 days immediately preceding its effective date.

⁶⁰ AMIA, News Release, (Feb. 15, 1968).

⁶¹ Insurance Information Institute, News Release, (Nov. 29, 1967). For the interpretation of comparable provisions in accident and health policies, see Annot., *Construction of Express Insurance Policy Provision Restricting Insurer's Right to Cancel or Otherwise Terminate Coverage*, 19 A.L.R.3d 1429 (1968).

⁶² The endorsement provides:

ALLSTATE PLEDGES

effective 60 days after the inception of such coverages, or effective immediately if Allstate has renewed such coverages, that thereafter during the five year period following the effective date of this endorsement:

1. Allstate shall not exercise its right to cancel such coverages or reduce the limits the liability of such coverages, and
2. Allstate shall continue such coverages in force, all subject to the following conditions:

A. Allstate's obligation to continue the coverages in force during such period shall be met by the annual or semi-annual extension of the

not apply to certain misrepresentations, because the Pledge is made expressly subject to the truth of the declarations in the policy.⁶³ *Taylor v. Black*⁶⁴ held that Allstate's "Pledge Against Cancellation" did not bar avoidance *ab initio* of the policy for a material misrepresentation. The court stated:

[B]y reason of Black's (the insured) fraudulent representations the policy was void *ab initio*, there never was an effective contract, with the result that neither the Pledge nor any of the other policy provisions are binding on the garnishee (insurer).

...⁶⁵

More recently various insurance companies have agreed to voluntarily restrict the reason for which they could refuse to renew automobile insurance policies. Nationwide Mutual Insurance Co. and Allstate Insurance Co. have recently issued "guarantees of renewal."⁶⁶ The re-

Automobile Bodily Injury Liability and Property Damage Liability coverages until they have thus been kept in force for the five year period. Each such extension shall be in accordance with the policy forms and at the rates legally in effect for use by Allstate at the time of such annual or semi-annual extension.

B. This agreement shall be void and of no effect:

- (1) If, during such five year period, the named insured or any resident of the named insured's household is convicted or forfeits bail for any of the following:
 - (a) driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs;
 - (b) failing to stop and report when involved in an accident;
 - (c) homicide arising out of the operation of a motor vehicle;
 - (d) driving a motor vehicle during a period of revocation or suspension of his driver's license;
 - (e) theft of a motor vehicle;
 - (f) the making of false statements in the application for driver's license.
- (2) If the insured fails to comply with policy Condition 8, which requires assistance and cooperation after an accident, or ceases to be domiciled in a state wherein Allstate regularly affords the protection afforded by this endorsement.
- (3) If the named insured's representations, as contained in policy Declaration 10, are not true.
- (4) If the premium for the policy, or for any annual or semi-annual extension thereof, is not paid when due.
- (5) As regards insurance afforded with respect to any "owned automobile" which is not a "private passenger automobile."

⁶³ *Id.* under 2 (B) (3) of the endorsement.

⁶⁴ 258 F. Supp. 82 (D.C. Mo. E.D. 1966); The fact that the "Pledge" is subject to the truth of the declarations in the policy was not determinative of the Taylor case, because Allstate failed to plead misrepresentation in the declarations, but only pleaded that the application for the policy contained misrepresentations.

⁶⁵ *Id.* at 88; *cf.* Pacific Mut. L. Ins. Co. v. Strange, 226 Ala. 98, 145 So. 425 (1932), Mutual Ben. Health & Acci. Assoc. v. Lesler, 10 F. Supp. 124 D.C. Ky. 1934); *but cf.* Behrman v. Massachusetts Cas. Ins. Co., 106 Ohio App. 293, 148 N.E.2d 247 (1958).

⁶⁶ The Allstate guarantee of renewal endorsement provides:

Allstate guarantees that it will continue to insure you, during the guarantee period, for the automobile insurance coverages and limits afforded by your policy, if you pay premiums when due; but this guarantee terminates in the event that:

you or any resident of your household, during the guarantee period, has

newal endorsement provides that the insurer guarantees to continue the insurance in force for the period of five years. The guarantee is subject to the payment of premiums and the condition that neither the insurer nor any member of his household has his driver's license suspended or revoked. The renewal policies are issued in accordance with the forms and rates of the insurer in effect at the time of renewal.⁶⁷

The most recent development in this area is a program introduced by the Kemper Group, which would provide for a "lifetime" guarantee of renewal for senior citizens.⁶⁸ Under the program, if the insured has been a policyholder of the insurer for at least five years prior to reaching sixty-five, the insurer agrees to continue to renew the policy for life. The agreement provides that the suspension or revocation of the driver's license, the impairment of eyesight, and the nonpayment of premiums are the only reasons whereby an insurer could refuse to renew. Upon reaching seventy-two years of age, a policyholder could be required to provide a physician's certificate as to his physical capability to safely operate an automobile.

IV. POLICY CANCELLATION PROCEDURE

The cancellation condition of the Standard Family Combination Automobile Policy (1963 Rev.) provides:

This policy may be canceled by the insured named in Item 1 of the declarations by surrender thereof to the company or any of its authorized agents or by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

... Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

It is the majority rule that the above language is clear and unambiguous, and that mailing of the notice of cancellation to the named

his driver's license suspended or revoked, or is convicted of driving without having a driver's license.

The guarantee period begins, as to each coverage afforded, on the 60th day after the effective date of such coverage and continues until the expiration of 5 years starting with the effective date of the policy.

The continuation of your insurance shall be through annual extension in accordance with the policy forms and rates then in effect for Allstate.

⁶⁷ *Ibid.*

⁶⁸ Insurance Advocate, March 30, 1968.

insured at the address shown in the policy is sufficient proof of notice of cancellation, and that proof of receipt of the notice is not required.⁶⁹ However, if the language is ambiguous the courts will construe in favor of the insured and require proof of actual receipt of the notice.⁷⁰

There is a great deal of confusion as to whether actual receipt of notice is required, or whether mailing alone is sufficient proof of notice. And, as to which of these requirements constitutes the majority rule.⁷¹ Much of this confusion can be attributed to the following situations wherein the court may require the actual receipt of notice of cancellation, and yet not prevent the parties from making an agreement that mailing alone is sufficient proof of notice:

- (a) The policy provision does not expressly provide that mailing is sufficient proof of notice.
- (b) The insurer did not strictly comply with the policy provision.
- (c) The policy provision conflicts with the applicable state statute.⁷²

Thus, the Supreme Court of Iowa in *Selkin v. Northland Ins. Co.*⁷³ held that actual receipt of notice is necessary, not because mailing alone was not sufficient under the policy provision, but because the policy provision conflicted with the state statute which required actual receipt, according to the court's interpretation of the statute.

Aside from the above three situations, it is probably the "majority rule" that where the policy provision authorizes mailing as sufficient proof of notice, the agreement of the parties in the policy is valid and actual receipt of notice is not required.⁷⁴

Minnesota adheres to the so-called "minority rule" on notice of cancellation. The Minnesota rule states that although the language of the condition provides that mailing constitutes "sufficient proof of notice," the trier of fact is still entitled to find that notice was not received where the insured testified that he did not receive notice, and that to hold otherwise would be contrary to public policy.⁷⁵

The policy condition generally only requires that the notice be deposited in the ordinary mail;⁷⁶ however some state statutes require the insurer to use registered or certified mail.⁷⁷ The insurer has the burden

⁶⁹ LONG, LIABILITY INSURANCE § 15.01 (1966).

⁷⁰ Annot., *Actual receipt of cancellation notice mailed by insurer as prerequisite to cancellation of insurance*, 64 A.L.R.2d 982 (1959).

⁷¹ LONG note 69 *supra*; Risjord, *Construction of Terms of Liability Insurance with Specific Reference to the Cancellation Condition*, 38 TEXAS L. REV. 198, 202 (1959); but see, Case Notes, *Insurance: Cancellation of Policy: Necessity of Actual Notice*, 6 U.C.L.A. L. REV. 462, 463 (1959).

⁷² *Ibid.*

⁷³ 90 N.W.2d 29 (Iowa 1958); noted in Case Notes, note 71 *supra*, and 44 Iowa L. REV. 808 (1959).

⁷⁴ LONG, note 69 *supra*.

⁷⁵ *Donarski v. Lardy*, 88 N.W.2d 7 (Minn. 1958); This case is noted in 43 MINN. L. REV. 157 (1958) and 11 ALA. L. REV. 189 (1958-59).

⁷⁶ LONG, note 69 *supra* at § 15.02.

⁷⁷ See note 8 *supra*.

of proof as to cancellation, and such proof of mailing must be clear and specific.⁷⁸ Thus, the insurer may be required to present substantial proof of the mailing of cancellation in order to obtain a directed verdict on this issue. The recent Wisconsin case of *Olson v. Hardware Dealers Mut. Fire Ins. Co.*,⁷⁹ reversed a trial court's directed verdict for the insurer, which had held that the policy had been canceled by the mailing of a notice of cancellation. The insurer, in support of its motion for a directed verdict, introduced into evidence a list which contained the notation that it was a cancellation list. The list contained the name, address and policy number of the insured, and included a metered postage stamp of the post office which acknowledged the mailing of the letters in the list. The court conceded that "proof of mailing, however, is conclusive of the notice issue,"⁸⁰ but, the court reversed the directed verdict, stating: "The proof of mailing procedures however, is not sufficient to prove the contents of the mailing. . . ."⁸¹ The court felt that the evidence was susceptible to the inference that the list merely showed an intention on the part of the insurer to include a cancellation notice in the letter which was unquestionably mailed. The court held that this inference was permissible despite the fact that the insured failed to introduce any evidence that he in fact received an empty envelope from the insurer. Chief Justice Hallows of the Wisconsin Supreme Court refuted the "logic" of the majority opinion and stated in his dissenting opinion:

This court reversed on the ground the evidence is susceptible of an inference that the notice of cancellation was not mailed. While the court admits a letter was mailed, it finds an insufficiency of proof concerning the envelope's contents. I would affirm because I do not think the evidence shows the defendant insurance company sent an empty envelope to the plaintiff. The inference, which I consider unreasonable, is not sufficient to entitle one to go to the jury.⁸²

The Standard Family Combination Automobile Policy requires at least ten days advance notice of cancellation; questions may arise as to the effect of a notice of cancellation which states that the cancellation shall be effective at a time less than ten days from the mailing of the notice. This problem arose in the recent case of *Moore v. Vernon Fire & Cas. Ins. Co.*,⁸³ in which the court held that a notice of cancellation for a shorter period of time than required is not effective as stated, but is effective at the expiration of the required period. The court stated that the purpose of the advance notice requirement is "to enable the

⁷⁸ LONG, note 69 *supra* § 15.03.

⁷⁹ 156 N.W.2d 429 (Wis. 1968).

⁸⁰ *Id.* at 431.

⁸¹ *Id.* at 433.

⁸² *Id.* at 434.

⁸³ 234 N.E.2d 661 (Ind. App. 1968).

insured to obtain insurance with some other company. . . ."⁸⁴ The court held that under the facts of the case the insured had sufficient time in order to obtain coverage with another company, but had failed to avail himself of this opportunity.

Of course, the cancellation provisions of the automobile insurance policy are not the sole means by which a policy may be canceled. The parties may mutually agree to use a different mode of cancellation. Thus, the policy may be cancelled by the parties consent, express or implied from the circumstances, independent of the terms of the policy.⁸⁵

The language of the notice must be positive and unequivocal in providing the insured with notice as to cancellation and when it shall be effective.⁸⁶ It has been held that the cancellation clause insists upon a single purpose notice of present termination, and that the notice must not be both a bill for a premium due and in the alternative a termination of the policy.⁸⁷ Courts have also invalidated cancellation notices because they were conditional on some future act or omission of the insured.⁸⁸

The insurer must mail the notice to the correct name and address as shown in the policy, unless, of course, the insurer can show actual receipt of the notice.⁸⁹ The notice of cancellation is effective if mailed to the name and address of the insured as stated in the policy, despite the fact that the insured has changed his address, unless it is shown that the insured had sufficient notice of a change in address of the insured.⁹⁰ Of course, this notice of a change in residence must be factually sufficient, and the insurer is not put on notice of any change in residence by the mere fact that the insured corresponds with the insurer from different addresses.⁹¹

The language of the above stated standard basic automobile policy clearly indicates that the return of the unearned premium is not a condition precedent to effective cancellation. The balance of the unearned premium held by the insurer merely creates a debtor-creditor relationship.⁹² However, if the language is not clear and unambiguous, the court may find that the return of the unearned premium is a condition precedent to cancellation.⁹³

⁸⁴ *Id.* at 663.

⁸⁵ Annot., *Mutual Rescission, Waiver, Ratification or Estoppel, as regards insurer's attempt to rescind policy of insurance or particular provision thereof*, 152 A.L.R.2d 95 (1944).

⁸⁶ LONG, note 69 *supra* at § 15.08.

⁸⁷ Relihan, *The Uncertain Expiration Date of the Auto Liability Policy: Some Problems Under Financial Security and Compulsory Insurance Law*, 29 INS. COUNSEL J. 639 (1962).

⁸⁸ *Ibid.*

⁸⁹ LONG, note 69 *supra* § 15.05, 15.06.

⁹⁰ Annot., *Provision of policy for mailing of notice to insured's address as stated therein, as affected by change of address*, 63 A.L.R.2d 570 (1959).

⁹¹ LONG, note 69 *supra* § 15.06.

⁹² LONG, note 69 *supra* § 15.06.

⁹³ Annot., *Repayment or tender of unearned premium as condition precedent to exercise by insurer of right to cancel policy*, 16 A.L.R.2d 1200 (1951).

V. EXPIRATION AND RENEWAL

The insurer is under no obligation to notify the insured of the expiration or nonrenewal of the policy in the absence of a statute or an express or implied agreement to the contrary. *Borne v. Dillon*⁹⁴ held that the Louisiana statute requiring a particular form of notice for "cancellation" did not apply to the expiration of the policy. The court stated: "the policy having expired, cancellation was unnecessary. . . ."⁹⁵ *Farmer's Ins. Exchange v. Vincent*⁹⁶ took substantially the same position in holding that "a letter giving notice of intention not to renew is not a cancellation. . . ."⁹⁷ After the *Vincent* case California enacted a statute requiring notice of intention not to renew.⁹⁸

Of course, the insurer may expressly obligate itself to the issuance of a renewal policy under endorsements which provide for guarantees of renewals. The agent of the insurer may also obligate the insurer to the issuance of a renewal policy either by his express agreement or by his course of conduct. *Westchester Fire Ins. Co. v. Tantalo*,⁹⁹ held that an authorized agent may orally obligate the insurer to the issuance of a renewal policy, or that such conduct will estop the insurer from the denial of the issuance of the policy.

VI. AUTHORITY OF AGENTS TO CANCEL OR TO RECEIVE NOTICE THEREOF

An agent may have the authority to act for either the insured or the insurer in the cancellation of the policy. The "agent" does not have to be an insurance agent or broker, but may be other persons such as lessors or premium finance agents¹⁰⁰ who have the proper authority. The authority of the agent may either be express or implied. The agent may have the express or implied authority to act as an agent of the insurer in order to receive notice of cancellation or to deliver a policy for cancellation. If the agent has the express authority to receive notice of cancellation for the insurer, it is a general practice to attach an endorsement to the policy to that effect.¹⁰¹ In order for the court to find that the agent has implied authority to receive notice of cancellation for

⁹⁴ 201 So.2d 115 (La. App. 1967).

⁹⁵ *Id.* at 119.

⁹⁶ 56 Cal. Rptr. 775 (Cal. App. 1967).

⁹⁷ *Id.* at 782.

⁹⁸ CAL. INS. CODE § 670 (Supp. 1967).

⁹⁹ 272 F. Supp. 7 (D.C. Conn. 1967).

¹⁰⁰ This article will not discuss the problems involved in the cancellation of insurance policies by premium finance agencies. Many times the agency may require an express power of attorney from the insured authorizing the agency to effectuate cancellation or receive notice thereof. Some recent cases discussing the problems involved are: *Grant v. State Farm Mut. Auto. Ins. Co.*, 159 S.E.2d 368 (N.C. App. 1968) and *Brinkley v. Prudence Mut. Cas. Co.*, 199 So.2d 490 (Fla. 1967).

¹⁰¹ LONG, note 69 *supra* § 15.09.

the insured, there must be a showing of a clear intention by the insured to relinquish his right to receive notice.¹⁰²

*Fidelity & Cas. Co. of New York v. Indiana Lumbermens Mut. Ins. Co.*¹⁰³ held that where the lessor had express authority in the lease agreement to procure insurance for the lessee, the lessor may also agree with the insurance company to cancel the insurance, when such action was pursuant to the procurement of other insurance. *Vassel v. Underwood*¹⁰⁴ held that the broker who had the possession of the policy was the agent of the insurer rather than the insured. The agent could not act as the agent of the insured and deliver the policy for cancellation to the insurer. Therefore, the insured had the right to receive ten days advance notice of the cancellation pursuant to the provision in his policy.

The case of *International Service Ins. Co. v. Maryland Cas. Co.*,¹⁰⁵ discussed the authority of an agent to act for the insurer in order to effectuate cancellation. The insurer authorized the agent to cancel the policy. The agent instructed one of his employees to effectuate cancellation. The court held that the action of the employee in canceling the policy constituted cancellation "by the company" under the applicable policy provision.

VII. NOTICE TO LOSS PAYEE

A loss payee is a mortgagee or a conditional vendor who has a security interest in the insured automobile. The mortgagee can protect his security interest in the insured automobile by having an endorsement making him a loss payee. It is assumed that such endorsement would apply only to the collision and the physical damage coverage provisions of the insurance policy. A loss payee obviously would want to be notified about any cancellation of the insurance policy, and a recent case has decided the question as to whether it is necessary to notify a loss payee in order to effectively cancel the coverage. *Ford Motor Credit Co. v. Commonwealth Mut. Ins. Co.*¹⁰⁶ held that an insurer is not required to give notice of cancellation to a loss payee. In that case the Ford Motor Credit Co. was named as a loss payee in an endorsement to the policy. The cancellation provision stated that cancellation may be effected by the mailing of the notice to "named insured in Item No. I." Ford Motor Credit was not named in Item No. 1. The court stated that it would only be necessary to give notice to a loss payee if he is a named insured or if there is a specific endorsement requiring notice to him.

The State Farm Mutual Automobile Insurance Co. Standard Risk Policy eliminates the problem of the *Ford* case by including a provision

¹⁰² *Ibid.*

¹⁰³ 382 F.2d 839 (5 Cir. 1967).

¹⁰⁴ 85 Ill. App.2d 222, 229 N.E.2d 354 (1967).

¹⁰⁵ 421 S.W.2d 721 (Tex. App. 1967).

¹⁰⁶ 420 S.W.2d 732 (Tex. App. 1967).

which requires notice of the termination of the policy to the loss payee.¹⁰⁷ Georgia, Maine and Massachusetts have statutes which require that notice of cancellation be given to a loss payee.¹⁰⁸

VIII. THE RIGHT OF RESCISSION FOR MISREPRESENTATION

In general, a material misrepresentation in the application for insurance or in the policy will void the policy.¹⁰⁹ If the insurer issues a policy based upon a material misrepresentation, upon the discovery of the falsity of the representation the insurer may elect to rescind the policy.¹¹⁰

Misrepresentations, whether they apply to the named insured or to any actual or potential operator of the insured vehicle, are generally held to be material when they relate to the previous driving record of violations or accidents,¹¹¹ and previous cancellations or denials of automobile insurance.

The test of materiality is the probable effect the representation may have had upon the decision of the underwriter.¹¹² *Miller v. Plains Ins. Co.*¹¹³ provides a good discussion of what amounts to a material misrepresentation.

A misrepresentation that would likely affect the conduct of a reasonable man in respect to his transaction with another is material. Materiality, however, is not determined by the actual influence the representation exerts, but rather by the possibility of its so doing. A representation made to an insurer that is material to its determination as to what premium to fix or whether it will accept the risk, relates to a fact actually material to the risk which the insurer is asked to assume. . . .¹¹⁴

¹⁰⁷ The clause provides:

If a mortgage owner, conditional vendor, or assignee is named in the exceptions, loss, if any, under coverages D, D-50, F and G shall be payable to the named insured and to such additional interest as such interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor by any change in the title or ownership, nor by any error or inadvertence in the description of the automobile until after notice of termination of the policy shall be given to such mortgage owner, conditional vendor, mortgagee or assignee stating when not less than 10 days thereafter such termination shall be effective; provided, the lien-holder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lien-holder and failure to do so will render this policy null and void.

¹⁰⁸ ME. REV. STAT. ANN. ch. 24, § 1051 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 175, § 187 (C) (Supp. 1966); GA. CODE ANN. § 56-2430.1 (Supp. 1967). Cf. *South Carolina Ins. Co. v. Glennville Bk.*, 11 Ga. App. 174, 141 S.E.2d 168 (1965).

¹⁰⁹ For a more detailed discussion of this area see, Magarick, *The Application and the Declarations in the Standard Automobile Policy*, 1962 Ins. L. J. 741.

¹¹⁰ LONG, note 69 *supra* § 19.02.

¹¹¹ Annot., *Materiality of false statements by applicant for automobile insurance as to license revocation or suspension or traffic violation*, 89 A.L.R.2d 1027 (1963).

¹¹² LONG, note 69 *supra* § 19.03.

¹¹³ 409 S.W.2d 770 (Mo. App. 1966).

¹¹⁴ *Id.* at 774.

However, the insurer's agent can so conduct the application procedure so as to prevent any inference that the misrepresentation was material. *Tsosie v. Foundation Reserve Ins. Co.*¹¹⁵ held that the agent so ignored the driving record of the applicant that the court doubted that, if the representation had been stated truthfully, it would "... have been any more important than the other matters about which the agent was told and which he failed to note. . . ."¹¹⁶

*Taylor v. Black*¹¹⁷ held that the insured's misrepresentations as to the previous cancellation of the insured's wife's auto insurance were material, and voided the policy. *Modisette v. Foundation Reserve Ins. Co.*¹¹⁸ held that the insured's misrepresentations as to his previous driving records and record of insurance cancellations were material, and voided the policy. *Allstate Ins. Co. v. Meloni*¹¹⁹ held that misrepresentations as to the suspension of the insured's husband's driver's license and as to his potential operation of the insured vehicle, voided the policy.

Several of the more recent cases have discussed the materiality of the insured's misrepresentations as to the actual ownership or operation of the insured vehicle.¹²⁰ The court stated in *Government Employees Ins. Co. v. Dennis*¹²¹ that: "The character and judgment of the owner as well as his or her true status, have a definite bearing upon the risk involved."¹²²

*Southern Farm Bureau Cas. Ins. Co. v. Allen*¹²³ held that the transfer of title of the insured automobile into the name of another, in order that the original owner obtain insurance, constitutes a material misrepresentation. However, the insurer must show that it has attempted to elicit the "actual" ownership and operation from the insured. Thus, the court in *Hawkeye-Security Ins. Co. v. Burdick*,¹²⁴ stated that the insured is not required to: "... engage in surmise as to such details as might be desired by the insurer and to volunteer them without being asked. . . ."¹²⁵ The court held that the policy was not defeated since the insurer failed to make sufficient inquiry as to the actual ownership and operation of the insured vehicle.

There is conflicting authority as to the duty of the applicant for insurance to read the application, and to be bound by the answers there-

¹¹⁵ 427 P.2d 29 (N.M. 1967).

¹¹⁶ *Id.* at 31.

¹¹⁷ 258 F. Supp. 82 (D.C. Mo. E.D. 1966) *But see*, S.C. Code § 46-750.54 (Supp. 1967) which expressly provides that misrepresentations as to previous cancellations shall be deemed immaterial.

¹¹⁸ 427 P.2d 21 (N.M. 1967).

¹¹⁹ 98 N.J. Super. 154, 236 A.2d 402 (1967).

¹²⁰ Annot., *Misrepresentation by applicant for automobile liability insurance as to ownership of vehicle as material to risk*, 33 A.L.R.2d 948 (1954).

¹²¹ 232 N.E.2d 750 (Ill. App. 1968).

¹²² *Id.* at 754.

¹²³ 388 F.2d 126 (5 Cir. 1967).

¹²⁴ 388 F.2d 205 (7 Cir. 1967).

¹²⁵ *Id.* at 207.

in, despite the fact he did not read the application.¹²⁶ *Miller v. Plains Ins. Co.*¹²⁷ held that the applicant is bound to know the content of the application whether she reads it or not. And this duty is not affected by the fact that she trusted or relied upon the agent to prepare the application where there is no evidence of fraud or mistake on the part of the agent. In the *Miller* case the evidence showed that the applicant was of average intelligence and ability, and no doubt was cast upon her ability to read or comprehend the application. The court in *Allstate Ins. Co. v. Meloni*¹²⁸ held that the insured may not claim that she was "mistaken" as to the meaning of the application when the language is clear and unambiguous. However, the previously discussed case of *Tsosie v. Foundation Reserve Ins. Co.*¹²⁹ points out that the agent may so conduct the application procedure so as to bar the allegation of a duty to read the application.

If the insurer has knowledge of the misrepresentation and despite such knowledge issues the policy, it may not later avoid the policy on the basis of the misrepresentation. This principle can be justified either on the basis of waiver or estoppel, or because the insurer had full knowledge of the falsity of the misrepresentation and it would be entirely inconsistent for the insurer to claim that it relied on the truth of the representation. Several questions arise in this area. To what extent is the insurer held to have knowledge of all of the information in its files? To what extent is the insurer under an obligation to investigate the truth or falsity of representations? To what extent is the insurer held bound to the knowledge of its agents?

*Taylor v. Black*¹³⁰ held that the insurer's knowledge of the insured's wife's maiden name did not constitute knowledge of her subsequent married name. The court in *Modisette v. Foundation Reserve Ins. Co.*¹³¹ stated:

Notice of this one item of concealment . . . does not operate as notice of all the other items either concealed or misstated by plaintiff. . . . Recognition of the processes involved . . . in the orderly and proper conduct of an insurance business compels a recognition of the fact that every sales agent and (sic) other officer or employee of an insurance company can not be charged with notice of all that exists in the company's files. . . .¹³²

*Allstate Ins. Co. v. Meloni*¹³³ held that the use of an independent investigation did not absolve the insured:

¹²⁶ LONG, LIABILITY INSURANCE, §§ 17.25, 19.04 (1966).

¹²⁷ See note 113 *supra*.

¹²⁸ See note 119 *supra*.

¹²⁹ See note 115 *supra*.

¹³⁰ 258 F. Supp. 82 (D.C. Mo. E.D. 1966).

¹³¹ See note 118 *supra*.

¹³² *Id.* at 28.

¹³³ See note 119 *supra*.

from speaking the truth nor did it lessen the right of the company to rely upon her statement, unless the investigation disclosed facts sufficient to expose the falsity of the representation made or was of such nature as to place upon the company the duty of making further inquiry. . . .¹³⁴

The recent case of *Union Ins. Exch. v. Gaul*¹³⁵ seems to conflict with the *Modisette* case in that it holds that knowledge of one item of concealment may put the insurer on notice of other possible concealments. The *Gaul* case is in accord with the principle stated in the *Meloni* case that the insurer may no longer rely upon the statements in the application if investigation exposes a falsity of such a nature so as to put upon the insurer the duty of making further inquiry.

In the *Gaul* case the insured misrepresented his prior insurance cancellations, his prior license revocation, and his traffic violations. The insurer originally rejected the application upon the discovery of the prior insurance cancellation and the fact that this was misrepresented. However, the insurer, upon the insistence of its agent, reconsidered and accepted a second application. The agent knew that the prior cancellation was because of "too many accidents" and it was shown that both the agent and the insurer could have obtained more information as to the prior cancellation. The court stated that because of the insurer's imputed knowledge of the insured's "too many accidents," and because of the insurer's knowledge that the insured had lied in the application: ". . . the insurer is estopped from rescinding this policy because it possessed facts that would have put a prudent insurer on further inquiry that would have disclosed the falsity. . . ."¹³⁶

In the *Gaul* case the court imputed the knowledge of the agent to the insurer. It may be stated that knowledge of an authorized agent within the scope of his authority constitutes knowledge to the principal. However, this principle does not apply where the agent, in collusion with the insured, is operating a fraud upon the insurer. The court in *Southern Farm Bureau Cas. Ins. Co. v. Allen*¹³⁷ stated that collusion may consist of the agent being placed "in the light of having assisted in bringing about the consummation of the fraudulent transaction. . . ."¹³⁸

Would the principles of the *Meloni* and *Gaul* cases apply to statutory revisions which would limit the right of the insurer to cancel after a sixty day underwriting period? Under the earlier "model bills," one permissible reason for cancellation was that "the policy was obtained through a material misrepresentation." The more recent AIA-AMIA "model bill" would eliminate material misrepresentation as a permissible reason for cancellation. Would the enactment of such a proposal also

¹³⁴ *Id.* 236 A.2d at 405-406.

¹³⁵ —F.2d—1968, CCH Auto. Ins. Cases 7559 (7 Cir. 1968).

¹³⁶ *Id.* 1968 CCH Auto. Ins. Cases 7561.

¹³⁷ See note 123 *supra*.

¹³⁸ *Id.* at 131.

eliminate the right of the insurer to *rescind* for a material misrepresentation? *Taylor v. Black*¹³⁹ held that a limitation upon cancellation in the *insurance policy* did not bar the insurer's right to rescind. However, the question remains would the principles of the *Taylor* case also apply to *statutory* limitations upon the right of the insurer to cancel?

The courts could interpret a statutory revision such as the AIA-AMIA "model bill" as operating as a statutory estoppel, which would bar an insurer's rescission for misrepresentations which the insurer failed to discover during the sixty-day underwriting period. The courts could reason that the purpose of the sixty-day underwriting period is to allow the insurer to discover material misrepresentation. AMIA, in a release dated February 15, 1968, stated that during the sixty-day underwriting period "the company would have the right to turn down the applicant if its investigation disclosed misrepresentation. . . ." Perhaps the insurer's failure to discover misrepresentations would operate as an estoppel barring any rescission of the policy after the sixty-day underwriting period, in the absence of affirmative conduct on the part of the insured preventing discovery of the true facts.

IX. LIMITATIONS UPON THE RIGHT OF RESCISSION

There are limitations upon the insurer's right of rescission in both the case law and in particular statutes. These limitations may operate to make the insurance policy valid and enforceable despite the existence of grounds for rescission. These limitations may prevent the insurer from rescinding the policy against certain third parties, or they may also prevent a rescission in respect to the insured.

*Government Employees Ins. Co. v. Dennis*¹⁴⁰ held that the rights of third parties injured by the negligence of the insured are no greater than the rights of the insured. Thus, a rescission does not deprive such injured third parties of any vested property rights. However, *Southern General Ins. Co. v. O'Keefe*¹⁴¹ held that a court order rescinding the insurance policy could not affect the rights of injured third parties who were neither served, nor were a party to the action. *McLane v. Farmers Ins. Exch.*¹⁴² held that a default judgment by the insurer against the insured rescinding the policy would not bar recovery by an injured third party, since his rights "vested, either at the time of the accident or at the time of the implied waiver of the right to rescind. . . ."¹⁴³

A. *Compulsory Auto Insurance and Financial Responsibility Laws*

The purpose of compulsory auto insurance and financial responsibility laws is to protect the members of the public who are injured as a

¹³⁹ See note 117 *supra*.

¹⁴⁰ 232 N.E.2d 750 (Ill. App. 1968).

¹⁴¹ 275 F. Supp. 107 (D.C. Md. 1967).

¹⁴² 432 P.2d 98 (Mont. 1967).

¹⁴³ *Id.* at 100.

result of the negligence of the financially irresponsible motorist.¹⁴⁴ Therefore, insurers who issue policies under these laws may not be able to rescind the policy against innocent third parties after the occurrence of an accident despite the material misrepresentations of the insured. However, these laws may only afford protection to the innocent third parties, and not to the insured who practices a fraud upon the insurer. Thus, the Standard Family Combination Automobile Policy (1963 Rev.) has a provision for reimbursement under its clause relating to financial responsibility laws.¹⁴⁵ Under this provision, the insured agrees to reimburse the insurer for claims which the insurer is required to pay under the financial responsibility laws, but which the insurer would not be required to pay under the terms of the policy. In *Erie Ins. Exch. v. Gosnell*¹⁴⁶ the insurer sought reimbursement from its insured under this type or provision.

Almost all of the states have financial or safety responsibility laws.¹⁴⁷ It should be emphasized that these laws may have two separate and

¹⁴⁴ LONG, note 126 *supra*, § 15.16.

¹⁴⁵ The provision reads:

When this policy is certified as proof of financial responsibility for the responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

¹⁴⁶ 246 Md. 724, 230 A.2d 467 (1967).

¹⁴⁷ Massachusetts is the only state without a safety or financial responsibility law, however this state has compulsory auto liability insurance. The following statutes provide for safety or financial responsibility, in forty-nine states and the District of Columbia:

ALA. CODE tit. 36, § 74(42)-74(83) (Supp. 1965); ALAS. STAT. § 28.20.010-28.20.640; ARIZ. REV. STAT. ANN. § 28-1101-28-1225 (Supp. 1967); ARK. REV. STAT. ANN. § 75-1401-75-1493 (Supp. 1967); CAL. VEH. CODE § 16000-16503 (Supp. 1967); COLO. REV. STAT. ANN. § 13(7) (1)-13(7) (39); CONN. GEN. STAT. REV. § 14-107-14-135 (Supp. 1966); DEL. CODE ANN. tit. 21, § 2901-2972 (Supp. 1966); D.C. CODE § 40(417) (40) (498C) (Supp. 1966); FLA. STAT. ANN. § 324.011-324.271 (Supp. 1968); GA. CODE ANN. § 92A (601) (92A) (621) (Supp. 1967); HAWAII REV. LAWS § 160(80) (160) (126) (Supp. 1965); IDAHO CODE ANN. § 49(1501)-49-(1540) (Supp. 1967); ILL. REV. STAT. ch. 95½, § 7-101-7503 (Supp. 1967); IND. ANN. STAT. § 47(1044)-47-(1088) (1967); IOWA CODE ANN. § 321.A.1-321.A.39 (1968); KAN. GEN. STAT. ANN. § 8-722-8-769 (Supp. 1967); KY. REV. STAT. § 187.290-187.990 (Supp. 1967); LA. REV. STAT. § 32.851-32.1043 (Supp. 1966); ME. REV. STAT. ANN. ch. 29, § 781-788 (Supp. 1967); MD. ANN. CODE Art. 66½ § 116-149A (1967); MICH. STAT. ANN. § 257.501-257.532 (Supp. 1968); MINN. STAT. § 170.21-170.58 (Supp. 1967); MISS. CODE ANN. § 8285(01)-8285(41) (Supp. 1966); MO. REV. STAT. § 303.010-303.370 (Supp. 1967); MONT. REV. CODES ANN. § 53(418)-53-(458) (Supp. 1967); NEB. REV. STAT. § 60(561)-60-(569) (Supp. 1967); NEV. REV. STAT. § 485.010-485.420 (1963); N.H. REV. STAT. ANN. § 268:1-27 (1967); N.J. REV. STAT. § 39:6-23-39:6-104 (Supp. 1967); N.M. STAT. ANN. § 64(24) (42)-64-(24) (104) (Supp. 1965); N.Y. VEH. 6 TRAFFIC LAW § 330-368 (Supp. 1967); N.C. GEN. STAT. § 20-279.1-20-279.39 (Supp. 1967); N.D. CENT. CODE § 39(16)-(01)-39-(16.1) (23) (Supp. 1967); OHIO REV. CODE ANN. § 4509.01-4509.99 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 7(101)-7-(505) (Supp. 1967);

distinct provisions. They may require evidence of security to respond for damages for past accidents,¹⁴⁸ which usually requires the filing of an SR-21 form, or they may require evidence of the proof of financial responsibility for future accidents.¹⁴⁹ The major weakness of these laws is that the financially irresponsible motorist is usually allowed one accident before he is required to file proof of financial responsibility.¹⁵⁰

Many of the statutes provide that if the automobile insurance is issued under the financial responsibility laws, the liability of the insurer shall be absolute after the occurrence of loss.¹⁵¹ Thus, the insurer may

ORE. REV. STAT. § 486.011-486.991 (1967); PA. STAT. ANN. tit. 75, § 1401-1436 (1967); R.I. GEN. LAWS ANN. § 31(1)-31-(33) (6) (Supp. 1967); S.C. CODE § 46.701-46.750.28 (Supp. 1967); S.D. CODE § 44.03A01-44.03A70 (1960); TENN. CODE ANN. § 59(1201)-59-(1240) (Supp. 1967); TEX. REV. CIV. STAT. Art. 67.01h (Supp. 1967); UTAH CODE ANN. § 41(12) (1)-41-(12) (4) 41 (Supp. 1967); VT. STAT. ANN. tit. 23, § 801-888 (Supp. 1967); VA. CODE ANN. § 46.1-388-46.1-514 (1966); WASH. REV. CODE ANN. § 46.29.010-46.29. 640 (Supp. 1967); W. VA. CODE tit. 56, § 17D(1) (1)-17D(6) (7) (Supp. 1967); WIS. STAT. ANN. § 344.01-344.52 (Supp. 1968); WYO. STAT. ANN. § 31(347)-31-(315) (Supp. 1967).

¹⁴⁸ WIS. STAT. § 344.12 (1965); For a discussion of safety and financial responsibility laws see, Urbom, *Safety Responsibility Acts: Availability of Policy Defenses After Certifying Presence of Insurance*, 29 INS. COUNSEL J. 220 (1962); Miller, *The New SR-21 in Wisconsin*, 25 INS. COUNSEL J. 342 (1958); Cowie, *Administration of Safety Responsibility Laws*, 22 INS. COUNSEL J. 465 (1955).

¹⁴⁹ WIS. STAT. § 344.24 (1965).

¹⁵⁰ The following articles discuss the financial responsibility acts and other laws which attempt to solve the problem of the financially irresponsible motorist: Jacobs, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL. L. REV. 545 (1965); Loiseaux, *Innocent Victims 1959*, 38 TEX. L. REV. 154 (1959); Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L. J. 700 (1959); and Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960).

¹⁵¹ The following statutes provide that policies issued under the State Financial Responsibility Act the liability shall be absolute upon the occurrence of loss: ALA. CODE tit. 36 § 74(62) (Supp. 1965); ALAS. STAT. § 28.20.440 (1959); ARIZ. REV. STAT. ANN. § 28-1170 (Supp. 1967); ARK. REV. STAT. ANN. § 75-1466 (Supp. 1967); COLO. REV. STAT. ANN. § 13-7-23 (2) (a) (Supp. 1960); DEL. CODE ANN. tit. 21, § 2903 (Supp. 1966); D.C. CODE § 40-474 (Supp. 1966); HAWAII REV. LAWS § 160-107 (Supp. 1965); ILL. REV. STAT. ch. 95½, § 7-317 (Supp. 1967); KAN. GEN. STAT. ANN. § 8-750 (Supp. 1967); KY. REV. STAT. § 187.490 (Supp. 1967); LA. REV. STAT. 32:900 (F) (1) (Supp. 1966); ME. REV. STAT. ANN. ch. 29, § 786 (Supp. 1967); MD. ANN. CODE Art. 66½, § 131 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 175, § 112 (Supp. 1966); MICH. COM. LAWS ANN. § 257.520 (Supp. 1967); MISS. CODE ANN. § 8285-21 (Supp. 1966); MO. REV. STAT. § 303.190 (Supp. 1967); MONT. REV. CODES ANN. § 53-438 (Supp. 1967); NEB. REV. STAT. § 60-538 (Supp. 1967); NEV. REV. STAT. § 485.3091 (1963); N.H. REV. STAT. ANN. § 268.16 (1967); N.J. REV. STAT. § 39:6-48 (Supp. 1967); N.M. STAT. ANN. § 64-24-87 (Supp. 1967); N.C. GEN. STAT. § 20-279.21 (Supp. 1967); N.D. CENT. CODE § 39-16-20 (Supp. 1967); OHIO REV. CODE ANN. § 4509.53 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 7-324 (Supp. 1967); ORE. REV. STAT. § 486.551 (Supp. 1967); PA. STAT. ANN. tit. 75, § 1421 (1967); R.I. GEN. LAWS ANN. § 31-32-24 (Supp. 1967); S.C. CODE § 46-702 (Supp. 1967); S.C. CODE § 44.03A52 (1960); TENN. CODE ANN. § 9-1223 (Supp. 1967); TEX. REV. CIV. STAT. Art. 6701h, § 21 (Supp. 1967); UTAH CODE ANN. § 41-12-21 (Supp. 1967); VA. CODE ANN. § 46.1-511 (1966); WASH. REV. CODE ANN. § 46.29.490 (Supp. 1967); W. VA. CODE § 17D-4-12 (Supp. 1967); WIS. STAT. ANN. § 344.33 (Supp. 1967); WYO. STAT. ANN. § 31-306 (Supp. 1967).

not be able to rescind the policy despite the material misrepresentations of the insured. New Jersey follows the rule that if the policy is issued under the financial responsibility law, it may not be rescinded. However, *State Farm Mut. Auto Ins. Co. v. Wall*¹⁵² held that, although the liability under the policy may be absolute as to innocent third parties injured in the accident, it was void as to the insured because of his misrepresentation. In *Allstate Ins. Co. v. Meloni*¹⁵³ the wife obtained the insurance policy, which was covered by the financial responsibility law, by means of material misrepresentation. The husband was subsequently involved in an accident while driving the insured auto. The court held that while the policy may not be voidable as to innocent third parties, it was voidable against the wife who was the "named insured" and against the husband who was an "insured" under his wife's policy.

The case of *Teeter v. Allstate Ins. Co.*¹⁵⁴ held that policies issued under New York's compulsory auto insurance law may not be rescinded *ab initio* for a material misrepresentation. The court held that it could not reconcile the right of rescission *ab initio* with the general statutory scheme of compulsory auto insurance, despite the fact that the particular statute relied upon applied only to "cancellation." The court stated that the term "cancellation" in the statute is not used in its technical insurance sense but in its colloquial sense as meaning a termination of the coverage in any manner prior to its expiration. The court refused to recognize any distinction between the rights of innocent third parties and the insured who had practiced a fraud upon the insurer. Thus, the insurer could not rescind despite the fact that there was not an accident or third parties involved. The court stated that the only way coverage could be terminated prior to the expiration of the policy was prospec-

The following statutes seem to be more limited in their application, and provide that policy issued under the financial responsibility laws shall not be annulled by an "agreement" between the insurer and insured after the occurrence of loss:

WIS. STAT. § 344.33 (6) (a) (1965);

IDAHO CODE ANN. § 49-1521 (Supp. 1967).

The following statutes are substantially similar to the Idaho and Wisconsin statutes, except they do not seem to be limited in their application to only policies issued under the financial responsibility laws.

ARIZ. REV. STAT. ANN. § 28-1123 (Supp. 1967); HAWAII REV. LAWS § 181-432 (Supp. 1965); KY. REV. STAT. § 304.684 (Supp. 1967); LA. REV. STAT. § 22:639 (Supp. 1966).

The following statutes seem to make liability absolute after the occurrence of loss and are not limited to Financial Responsibility Laws.

ALA. CODE tit. 28, § 11 (Supp. 1965); CONN. GEN. STAT. REV. § 38-175 (Supp. 1967); MO. REV. STAT. § 379.195 (Supp. 1967); OHIO REV. CODE ANN. § 3929.05 (Supp. 1967); OKLA. STAT. ANN. tit. 36, § 3625 (Supp. 1967); UTAH. CODE ANN. § 31-19-25 (Supp. 1967); WASH. REV. CODE ANN. § 48.18.320 (Supp. 1967); W. VA. CODE § 3391 (Supp. 1967).

¹⁵² 92 N.J. Super. 92, 222 A.2d 282 (1967).

¹⁵³ See note 119 *supra*.

¹⁵⁴ 192 N.Y.S.2d 610, *aff'd* 212 N.Y.S.2d 77, 173 N.E.2d 47 (1961); noted in 12 SYRACUSE L. REV. 141 (1961); but coverage may be defeated by failure to give timely notice of the accident, *NELLI v. NATIONAL SUR. CORP.*, 229 N.Y.S.2d 174 (N.Y. App. 1962).

tively pursuant to the advance notice provisions of the statute. However, the court did not foreclose the possibility that the insurer could have other remedies against an insured who had perpetrated a fraud. The court stated:

We are not called upon to say at this time what remedy, if any, an insurance company may have against an insured in tort or quasi contract for fraudulently inducing it to issue an insurance policy which it was thereafter forbidden to terminate except on the statutory notice. . . .¹⁵⁵

It would seem that an enactment in New York of a statute similar to the AIA-AMIA "model bill" would prevent an insurer from canceling or rescinding the insurance policy, anytime during the policy period, after the initial sixty-day underwriting period, except for the nonpayment of premium and the loss of driving privileges.

B. Assigned Risk Plans

At least thirty states authorize or require insurers doing business in the state to participate in an assigned risk plan,¹⁵⁶ and it is reported that the remaining states have voluntary programs.¹⁵⁷ There is conflicting authority as to whether policies issued under these plans may be rescinded for misrepresentation. The case of *Aetna Cas. & Sur. Co. v. O'Connor*¹⁵⁸ held that New York's assigned risk plan, which provides for only prospective cancellation, eliminates the insurer's right to avoid the policy for material misrepresentation. The court based its decision upon the fact that the fairly extensive statutory structure regulating the plan failed to mention the right of rescission. The court chided the in-

¹⁵⁵ *Id.* 192 N.Y.S.2d 619.

¹⁵⁶ ALA. CODE tit. 36, § 74(76) (Supp. 1965); ALAS. STAT. § 28.20.580; ARIZ. REV. STAT. ANN. § 28-1223A (Supp. 1967); ARK. REV. STAT. ANN. § 75-1486 (Supp. 1967); COLO. REV. STAT. ANN. § 72-13-16 (1964); CONN. GEN. STAT. REV. § 14-130 (Supp. 1966); DEL. CODE ANN. tit. 21, § 2907 (Supp. 1966); FLA. STAT. ANN. § 324.181 (Supp. 1968); GA. CODE ANN. § 92A-617 (Supp. 1967); HAWAII REV. LAWS § 160-121 (Supp. 1965); IDAHO CODE ANN. § 49-1535 (Supp. 1967); ILL. REV. STAT. ch. 95½, § 7-501 (Supp. 1967); KAN. GEN. STAT. ANN. § 40-2101-40-2104 (Supp. 1967); LA. REV. STAT. § 32:1043 (Supp. 1966); ME. REV. STAT. ch. 24, § 2775 (Supp. 1965); MD. ANN. CODE Art. 48A, § 243(n), 240A (1967); MISS. CODE ANN. § 8285-35 (Supp. 1966); MO. REV. STAT. § 303.210 (Supp. 1967); MONT. REV. CODES ANN. § 53-452 (Supp. 1967); NEV. REV. STAT. ch. 446, p. 1202, Session Laws (1967); N.H. REV. STAT. ANN. § 412:19, 412:19a (1967); N.M. STAT. ANN. § 58-21-1-58-21-13 (Supp. 1965); N.C. GEN. STAT. § 20279.34 (Supp. 1967); OHIO REV. CODE ANN. § 4509.70 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 7-501 (Supp. 1967); R.I. GEN. LAWS ANN. § 31-33-8 (Supp. 1967); S.D. CODE § 31.3501-1 (1960); TENN. CODE ANN. § 59-1238 (Supp. 1967); TEX. REV. CIV. STAT. Art. 6701h, § 35 (Supp. 1967); VA. CODE ANN. § 46.1-497-503 (1966).

¹⁵⁷ Insurance Information Institute, News Release, April 18, 1968.

¹⁵⁸ 207 N.Y.S.2d 679, 170 N.E.2d 681 (1960); noted in 12 SYRACUSE L. REV. 528 (1961). The principles of this case and the previously discussed cases in the area of compulsory auto insurance and financial responsibility were erroneously applied to a regular voluntary automobile insurance policy in the case of *Barrera v. State Farm Mut. Auto. Ins. Co.*, 1968 CCH Auto Ins. Cases 7787 (Cal. App. 1968).

surer for failing to discover the misrepresentation in its initial investigation and stated:

If that investigation had been performed properly the insured's misrepresentation would have been discovered. . . . While . . . (the insurer) may ultimately be held on a policy obtained by fraud, its liability is in a very real sense attributable to its own fault, and the true beneficiary is not the wrongdoer, but his innocent victims.¹⁵⁹

However, it is not entirely clear that other states would follow the New York decision in the *Aetna* case. *Virginia Farm Bureau Mut. Ins. Co. v. Saccio*¹⁶⁰ held that a policy issued under the Virginia Assigned Risk Plan could be voided for a material misrepresentation. The court distinguished the *Aetna* case stating that the Virginia plan was "not adopted by legislative requirement, but through legislative permission. . . ."¹⁶¹

As mentioned previously in this article, the Wisconsin Assigned Risk Plan expressly provides that the plan does not abrogate the insurer's right of rescission.¹⁶² It does not seem too speculative to surmise that the assigned risk plans in other states may have provisions similar to the Wisconsin provision and that the New York rule may be the minority rule.

C. *Waiver, Estoppel and Election*

The doctrines of waiver, estoppel and election may operate to prevent an insurer from rescinding a policy of insurance which was obtained by a material misrepresentation. These doctrines differ in several respects from the previously mentioned limitations upon rescission. They may apply with equal force to both the insured and the innocent third parties, whereas the previously mentioned limitations may only apply to innocent third parties. They may also operate to extend liability despite the fact of an effective cancellation of the policy, and some courts hold that they may operate to extend the coverage of the policy to a situation wherein no coverage existed. This article will not present a detailed discussion of these doctrines, but will merely highlight some recent cases.

Waiver is the intentional relinquishment of a known right, estoppel on the other hand is not consensual in character but defeats inequitable conduct, where such conduct induced the insured to rely and change his position to his detriment.¹⁶³

The case of *McLane v. Farmers Ins. Exch.*¹⁶⁴ held that after the insurer discovered facts entitling it to rescind, its affirmative acts in

¹⁵⁹ *Id.* 170 N.E.2d 684.

¹⁶⁰ 204 Va. 769, 133 S.E.2d 268 (1963).

¹⁶¹ *Id.* 133 S.E.2d 274.

¹⁶² See note 58 *supra*.

¹⁶³ Long, note 126 *supra* § 17.14.

¹⁶⁴ See note 142 *supra*.

paying claims and accepting premium operated as a waiver of its right to rescind. *Panizzi v. State Farm Mut. Auto. Ins. Co.*¹⁶⁵ held that the insurer's acceptance of part payment of the premium and its request for payment of the full premium in order to reinstate the policy, did not operate as a waiver of its effective notice of cancellation. *Insurance Co. of St. Louis v. Yates*¹⁶⁶ held that the insurer waived its right to void the policy, where two months subsequent to the rejection of the insured's application, its adjuster executed a settlement release with one of the parties injured in the accident.

*Westchester Fire Ins. Co. v. Tantalo*¹⁶⁷ held that the insurer was estopped from denying that the policy in question had expired, where the agent had promised to issue a renewal policy. The insured relied on the agent, and refrained from making other insurance arrangements. *Farmers Ins. Exch. v. Vincent*¹⁶⁸ denied the insured's claim of estoppel on the basis of a letter sent to a mortgagor erroneously stating the cancellation date of the policy, where under the facts of the case the insured had not been aware of the letter. *International Service Ins. Co. of Maryland Cas. Co.*,¹⁶⁹ also denied a claim of estoppel based upon a second erroneous notice of cancellation where the insured did not receive the notice.

In *Sneed v. Concord Ins. Co.*,¹⁷⁰ the court used the doctrine of estoppel to extend the policy coverage to include non-licensed drivers, despite the policy exclusion. The insurer's control of the investigation and the settlement of claims over an extended period of time operated as an estoppel, and the court stated it would presume a prejudice to the insured under these facts.

The court in the *Sneed* case also held that the letter of the insurer reserving its right to disclaim, did not bar the application of the doctrine of estoppel, since the insured was not given the opportunity to reject or accept the proposition of the insurer.

X. CONCLUSION

State legislatures which have not enacted laws changing the rules on the cancellation and nonrenewal of automobile insurance policies can expect to see the introduction of proposed statutes of future legislative sessions. It is not inconceivable that even those states which have recently enacted legislation can expect to receive suggestions for revisions that will impose greater restrictions upon the insurer's right of cancellation or nonrenewal.

¹⁶⁵ 386 F.2d 600 (3rd Cir. 1967).

¹⁶⁶ 200 So.2d 622 (Fla. App. 1967).

¹⁶⁷ 272 F. Supp. 7 (D.C. Conn. 1967).

¹⁶⁸ 56 Cal. Rptr. 775 (1967).

¹⁶⁹ 421 S.W.2d 721 (Tex. App. 1967).

¹⁷⁰ 237 A.2d 289 (N.J. App. 1967).

Proposals for change should be carefully analyzed in light of their purported purpose and the problems which they attempt to solve. These proposals must be considered within the total framework of insurance law for if they are merely considered on an *ad hoc* basis, their adoption may create problems greater than those which they purport to solve.

There is little question that problems exist as to the cancellation and nonrenewal of automobile insurance policies and that legislation is needed to prevent arbitrary and capricious cancellations. Legislation should be enacted which would limit the reasons for which insurers may cancel automobile insurance policies since any prior cancellation may hinder the policyholder in obtaining future coverage or may increase the premium which he would be required to pay, despite the increasing tendency to ignore prior cancellations as a determining factor in underwriting. The policyholder should receive adequate advance notice of a cancellation or nonrenewal, to allow him sufficient time to correct a notice based upon a "mistaken belief" or to obtain other coverage. The public should be protected from motorists who may become financially irresponsible as a result of an arbitrary cancellation.

The insurance industry is often criticized as being "defensive" in its attitude towards new statutory regulation. Thus critics say the industry only supports and proposes new legislation, when there is a clear and present danger that the critics may be able to rally sufficient public support for either the enactment of unreasonable state legislation, or for the intervention of the federal government. The authors of this article can not accept the "generalization" that the insurance industry is merely "defensive" since this generalization fails to consider the many statutory and voluntary innovations which have come from within the insurance industry itself.

Although the authors believe that it is necessary that state legislation be enacted we do not advocate the adoption of a particular statute or particular provisions. We believe that the nature and the content of the legislation to be adopted, should be left to the able judgment of the state legislatures, after due consultation with the responsible representatives of the insurance industry. However, any solution should give due regard to the interests of the individual policyholder, the policyholders as a group, the insurance industry, and the public in general. The solution should protect the individual policyholder from arbitrary action but should not require policyholders as a group to pay the cost of fraudulent and irresponsible policyholders. It should consider the interest of the public in eliminating the financially irresponsible motorist from the highways, but should not unduly regulate the activities of responsible insurers. It is hoped that this article may help toward a better understanding of the problems involved and of the alternatives available so

that the proposed solutions may be judged in light of their effect upon prior law, and their prospective judicial interpretation.

XI. APPENDIX

STATE STATUTES AND REGULATIONS—

CANCELLATION AND NONRENEWAL

State	<i>Limitations Upon Right of Cancellation</i>	<i>Requirement of Advance Notice of Cancellation</i>	<i>Requirement of Advance Notice of Non-Renewal</i>
California	Cal. Admin. Code tit. 10 Art 7.5, § 2371	Cal. Ins. Code § 651 (Supp. 1967)	Cal. Ins. Code § 670 (Supp. 1967)
Delaware	Del. Code Ann. Tit. 21, § 2908 (Supp. 1967)		
Florida (a)	Fla. Stat. Ann. § 627.0852 (Supp. 1967)	Fla. Stat. Ann. § 627.0852(3) (Supp. 1967)	Fla. Stat. Ann. § 627.0852 (Supp. 1967)
Georgia (a)	Ga. Code Ann. § 56-2430 (Supp. 1967)	Ga. Code Ann. § 56-2430(4) (Supp. 1967)	Ga. Code Ann. § 56-2430(5) (Supp. 1967)
Illinois (a)	III. Rev. Stat. ch. 73 §755.3 (Supp. 1967)	III. Rev. Stat. ch. 73 §755.4 (Supp. 1967)	III. Rev. Stat. ch. 73 §755.4 (Supp. 1967)
Indiana	Ins. Dept. Bull. 58, Aug. 22, 1966 (b)		
Iowa		Iowa Code Ann. § 515.80-.81 (1968)	
Kansas (a)	Kan. Gen. Stat. Ann. ch. 271, p. 513 Sessions Laws (1967)	Kan. Gen. Stat. Ann. § 40-278 (1967)	
Maine		Me. Rev. Stat. Ann. ch. 24, §1051 (1966)	

Maryland (a)		Md. Ann. Code Art. 48A, § 240A(d) (1968)	Md. Ann. Code Art. 48A, § 240 A(d) (1967)
Massachusetts		Mass. Gen. Laws Ann. Ch. 175, § 113 A(2) (Supp. 1966)	Mass. Gen. Laws Ann. Ch. 175, § 113F (Supp. 1966)
Michigan	Mich. Stat. Ann. § 24.13220 (Supp. 1968)	Mich. Stat. Ann. § 24.13224(3) 1324(2) (Supp. 1968)	Mich. Stat. Ann. § 24.13204(2) (Supp. 1968)
Minnesota (a).	Minn. Stat. § 72A.141-.148 (Supp. 1967)	Minn. Stat. § 72A.143 (Supp. 1967)	Minn. Stat. § 72A.144 (Supp. 1967)
Missouri (a)	Mo. Rev. Stat. § 379.202 (Supp. 1967)		
New York		N.Y. Vehicle & Traffic Law § 313 (Supp. 1967)	N.Y. Vehicle & Traffic Law § 313 (Supp. 1967)
No. Carolina	N.C. Gen. Stat. § 20-310(b) (Supp. 1967)	N.C. Gen. Stat. § 20-310(a) (Supp. 1967)	N.C. Gen. Stat. § 20-310(a), (c) (Supp. 1967)
No. Dakota (a)		N.D. Cent. Code § 26-02-32-33 (Supp. 1967)	N.D. Cent. Code § 26-02-34 (Supp. 1967)
Rhode Island	R.I. Ins. Dept. Reg. Aug. 15, 1962		
So. Carolina	S.C. Code § 46-750.61 (Supp. 1967)	S.C. Code § 46-138 (Supp. 1967)	S.C. Code § 46-138 (Supp. 1967)

So. Dakota (a)	S.D. Code H-684, eff. 7-1-68 Session Laws (1968)	S.D. Code H-684, eff. 7-1-68 Session Laws (1968)	S.D. Code H-684, eff. 7-1-68 Sessions Laws (1968)
Virginia	(c)	Va. Code Ann. 38.1-70.9 (Supp. 1966)	Va. Code Ann. 38.1-70.9 (Supp. 1966)
Washington (a)	Wash. Rev. Code Ann. § 48.18-2.2 (Supp. 1967)	Wash. Rev. Code Ann. § 48.18-2.1 (Supp. 1967)	Wash. Rev. Code Ann. § 48.18-2.1 (Supp. 1967)
West Virginia (a)	W. Va. Code § 33-6A (Supp. 1967)		W. Va. Code § 33-6A-4 (Supp. 1967)
Wisconsin (a)	Wis. Stat. Ann. § 204.341 (4) (Supp. 1967)	Wis. Stat. Ann. § 204.341 (5) (a) (Supp. 1967)	Wis. Stat. Ann. § 204.341 (5) (a) (Supp. 1967)

(a)—Statutes adopted or revised since January 1, 1967.

(b)—The regulation requires that policies issued in the state contain specified limitations upon cancellation or a conspicuous statement that the policy "contains none of the minimum standards regarding policy cancellation promulgated by the Insurance Department of Indiana."

(c)—It has been reported that by an administrative order of the Virginia State Corporation Commission certain standard limitations upon cancellation were prescribed as mandatory for use by all automobile insurers writing business in state. However, the authors of this article have been unable to obtain a citation to this order.

Editor's Note—Recent Legislative Developments:

It has been reported that a bill similar to the most recent AIA-AMIA proposal has passed the New York State Legislature and has been sent to the governor. Tennessee recently enacted a statute which would limit the reasons for cancellation and require that the reasons be furnished to the insured. It is reported that Pennsylvania recently enacted a cancellation-nonrenewal statute which may be the most comprehensive of any heretofore proposed or enacted. The statute includes the provisions of the most recent AIA-AMIA proposal. It also includes provisions similar to the recent Wisconsin statute (note 35 *supra*), which would apply not only to cancellation and nonrenewal but also to the refusal to issue a policy.